IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 13036 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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CHINTANSINH D CHUDASMA & 1 - Applicant(s)
Versus
BIPINBHAI NAVINCHANDRA SHAH & 1 - Respondent(s)

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Appearance :
MR KIRTIDEV R DAVE & MR RAHUL K DAVE for Applicants
MR YATIN SONI for Respondent No.1
MR KT DAVE, ADDL. PUBLIC PROSECUTOR for Respondent No.2

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 26/09/2007

ORAL JUDGMENT

1. By way of this application under Section 482 of the Criminal Procedure Code, the petitioners –

original Accused Nos. 4 and 5 have prayed for an appropriate order to quash and set aside the complaint being criminal case no.5115 of 2003 pending in the Court of learned JMFC, Bhavnagar filed by respondent No.2 – herein original complainant for the offences punishable under Section 138 of the N.I.Act qua the applicants.

2. A complaint being criminal case no.5115 of 2003 is filed by respondent No.1 against the petitioners and others in the Court of learned JMFC, Bhavnagar for the offences punishable under Section 138 of the NI Act ('N.I.Act' for short) alleging inter-alia that the petitioners and others named in the said complaint are the partners of partnership firm 'Swadeshi Multilink Company' and as they were in need of finance, they have got finance of Rs.25,000/- from the complainant with running interest at the rate of 1% and it was assured that the said amount would be repaid with interest on 05.05.2003. It is further alleged that the cheuqe dated 05.05.2003 was given to the complainant of Rs.25750/- drawn on Bhavnagar District Cooperative Bank Limited and when said cheque was deposited, same has been returned

with an endorsement 'Payment stop by drawer'. On 06.05.2003 thereafter again accused persons told the complainant to redeposit the same and accordingly said cheque was again redeposited on 03.06.2003, which has been dishonoured and returned by the Bank with an endorsement 'fund is insufficient' on 04.06.2003. It is further alleged in the complaint that thereafter statutory notice dated 10.06.2003 was issued upon the accused persons which came to be served upon the petitioners herein original accused Nos. 4 and 5. So far as other accused are concerned, they have avoided to accept RPAD notice. It is further averred that within the stipulated time as contemplated under Section 138 of the N.I.Act, cheque amount has not been paid. All the accused have committed offence under Section 138 of the N.I.Act. Therefore, aforesaid complaint came to be filed. In the said complaint, learned Chief Judicial Magistrate, Bhavnagar, issued summons upon the petitioners and others for the offences under Section 138 of the N.I.Act. Being aggrieved and dissatisfied with the same, the petitioners - herein original accused nos. 4 and 5 have preferred the present

application for the aforesaid reliefs.

3. Mr.Dave, learned Advocate appearing on behalf of the petitioners has vehemently submitted that the petitioners have not committed any offence as alleged under Section 138 of the N.I.Act as the petitioners were never partners of the firm at the relevant point of time and; that they have never signed the cheque. It is further submitted that they were not active partners in the firm and infact they were not partners on the date of issuance of the cheque in question. It is further submitted that even the complainant has not referred to any role of any of the petitioners in the firm and there are no averments in the complaint that the petitioners were incharge of the firm and/or day to day affairs at the time of transaction. Under the circumstances, in absence of any averments against the petitioners to the aforesaid effect, the petitioners cannot be held vicariously liable under Section 141 of the N.I.Act. Therefore, impugned complaint requires to be quashed and set aside. Mr.Dave, learned Advocate has heavily relied upon decisions of the Hon'ble Supreme Court in

the case of ***S.M.S.Pharmaceuticals Ltd. v/s. Neeta Bhalla & Anr.*** reported in *2005 (3) GLH 513;* ***N.K.Wahi v/s. Shekhar Singh & Ors.*** reported in *2007 AIR SCW 1880*; ***Sabita Ramamurthy and Anr. v/s. R.B.S.Channabasa Vardhya and Anr.*** reported in *(2006) 9 Scale 212*; ***Sarjokumar Poddar v/s. State (NCT of Delhi) and Anr.*** reported in *JT 2007(2) SC 233* and has requested to quash and set aside the impugned complaint and summons issued upon the petitioners.

4. The application is opposed by Mr.Soni, learned Advocate appearing on behalf of respondent No.1 original complainant. It is submitted that all the accused persons inclusive of the petitioners have intimated the complainant to redeposit the cheque and there are averments to that effect in the complaint. Therefore, the petitioners can be held vicariously liable as contemplated under Section 141 of the N.I.Act. It is submitted that even the partnership firm was not dissolved the date on which transaction took place and/or cheque in question was issued. He has relied upon the decision of the Hon'ble Supreme Court in the case of ***S.V.Mazmudar & Ors. v/s. Gujarat State Fertilizer Co.Ltd.*** reported in *AIR 2005 SC 2436*

and as held by Hon'ble Supreme Court in the aforesaid decision that the complaint could not be quashed on the ground that there are no material to show that at the time of offence they were incharge or responsible to company for conduct of the business. It is submitted that as held by the Hon'ble Supreme Court aforesaid question has to be adjudicated at the time of trial. It is further submitted that as such all the accused persons have cheated the complainant and therefore, impugned complaint is not required to be quashed and set aside by this Court in exercise of powers under Section 482 of the Cr.P.C.

5. Mr.K.T.Dave, learned APP appearing on behalf of the State has requested to pass an appropriate order considering the averments and allegations against the petitioners in the complaint.

6. Heard the learned Advocates appearing on behalf of the respective parties.

7. At the outset, it is required to be noted that the petitioners – original accused nos. 4 and 5 are alleged to be some of the partners of partnership firm 'Swadeshi Multi Links Company'. However, there

are no averments and/or allegations in the complaint attributing any role by any of the petitioners in the firm. Even there are no averments and allegations in the complaint to the effect that the petitioners were active partners in the firm and/or in day to day affairs and management of the partnership firm. In absence of any necessary averments as required under Section 141 of the N.I.Act, the petitioners as partners of the partnership firm cannot be held vicariously liable under Section 141 of the N.I.Act. Considering the decision of the Hon'ble Supreme Court in the case of ***N.K.Wahi***(supra) as well as decision of the Hon'ble Supreme Court in the case of ***Sabita Rammurthy & Anr*** (supra), as there are no specific averemnts and/or allegations in the complaint to the effect that the applicants as partners of the partnership were in active management and day to day affairs of the partnership firm, they cannot be held responsible and/or liable under Sections 138 read with Section 141 of the N.I.Act. Under the circumstances, without entering into further controversy whether the petitioners at the relevant time were partners of the partnership firm and solely

on the ground that there are no specific averments as required under Section 141 of the N.I.Act, impugned complaint and the summons issued by the learned Chief Judicial Magistrate upon the petitioners – original accused Nos.4 and 5 for the offence under section 138 of the N.I.Act requires to be quashed and set aside. So far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of *S.V.Mazumudar (supra)* is concerned, it appears from the said decision that there were necessary averments as required under Section 141 of the N.I.Act and what was submitted on behalf of the Directors was that there was no scope for direct participation in the conduct of business and were not involved in the conduct of the business. However, considering recent decision of the Hon'ble Supreme Court in the case of ***N.K.Wahi***(supra); ***Sabita Rammurthy***(supra) and ***Sarojkumar Poddar***(supra), which is after considering the decision in the case of S.V.Mzumadar(supra), and considering the fact that there are no specific averments and/or allegations against the petitioners – original accused No.s 4 and 5, impugned complaint filed against the petitioners – original accused nos.

4 and 5 for the offence punishable under Section 138 of the N.I.Act requires to be quashed and set aside.

8. For the reasons stated above, the petition succeed. Impugned complaint/case being No.5115 of 2003 pending in the Court of learned JMFC & Additional Civil Judge, Bhavnagar and the summons issued by the learned trial Court in the said case against the petitioners – original accused Nos. 4 and 5 are hereby quashed and set aside only qua the petitioners- original accused Nos.4 and 5. Rule is made absolute to the aforesaid extent.

[M.R.Shah, J.]

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